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No. 319

In the Supreme Court of the United States

OCTOBER TERM 1960

L. W. CHARLES, SR., PETITIONER

v.

J. W. SIMMONS, et al.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinion of the Supreme Court of Georgia is reported in 215 Ga. 794 (113 S. E. 2d 604). The purported transcript of the opinion and decision of the Supreme Court of Georgia as set out in Appendix 1 to the petition for writ of certiorari, pp. 11-17 inclusive, is neither accurate nor complete, and, for the convenience of the Court, the official transcript of this opinion and decision is included in this brief as Appendix 1, beginning at page 12.

JURISDICTION

Although petitioner cites several irrelevant sections of the United States Code Annotated, on page 8 of his petition under the heading "Jurisdiction", it seems clear that jurisdiction of this court is invoked under 28 U.S.C. Sec. 1257 (3).

QUESTIONS PRESENTED

1. Does the Supreme Court of the United States have jurisdiction to review the decision of the Supreme Court of Georgia when:

(a) The validity of no treaty or statute of the United States is drawn in question, and

(b) The validity of no state statute is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States; and

(c) Where no title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties, or statutes of, or commission held, or authority exercised under, the United States; and

(d) Where no Federal question was raised in, considered by, or decided by the Supreme Court of Georgia in its consideration of this case?

2. Will the Supreme Court of the United States review on petition for certiorari the decision of the Supreme Court of Georgia, when the petitioner did not avail himself of his opportunity to apply to the Supreme Court of Georgia for a rehearing, as provided by the rules of that Court?

STATUTES INVOLVED

I

28 U. S. C. Sec. 1257 (3).

"Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows:

'(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question, or where the validity of a state statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties, or statutes of, or commission held or authority exercised under, the United States.'

II

Rule 40, Rules of the Supreme Court of Georgia; (Sec. 24-4544 of the Code of Georgia).

"24-4544. **Rule 40. Motion, when and how made. Revision of opinions.**—No motion for a rehearing will be considered by this Court unless the same is filed in the office of the clerk thereof during the term at which the judgment sought to be reviewed was rendered, and before the remittitur has been forwarded to the clerk of the trial court. An original and six copies will be sufficient.

"(a) The Court may by special order in any case direct that the remittitur be transmitted to the clerk of the trial court immediately after the rendition of the decision and judgment, or at any other time, without awaiting expiration of the usual period of 10 days, and may otherwise by special order limit the time within which a motion for rehearing may be filed to any period less than 10 days, counsel in such cases to be notified. Unless an extension of time is requested and granted, a motion for rehearing must in any event be filed within 10 days from the rendition of the decision and judgment, regardless of whether the remittitur has been transmitted to the lower court.

"(b) No motion for rehearing by the same party after a first motion has been denied will be filed except by special order of the Court, although the clerk may receive any such later motion and deliver the same to the Court for action.

"(c) A rehearing will be granted, on motion of the losing party, only when it appears that the Court has overlooked a material fact in the record, a statute, or a decision which is controlling as authority and which would require a different judgment from that rendered, or has erroneously construed or misapplied a provision of law or a controlling authority. No motion for a rehearing will be entertained which does not expressly point out what material fact in the record, or controlling statute or decision, has been overlooked by the Court,

or what provision of law or controlling authority has been erroneously construed or misapplied.

"(d) There shall be attached to the motion a certificate of counsel that upon careful examination of the opinion of the Court he believes that such a fact, statute, or decision, has been overlooked, or that such provision of law or controlling authority has been erroneously construed or misapplied. The motion, when filed, shall show that a copy thereof has been served on opposing counsel, who may thereupon file a brief on the questions raised.

"(e) Repealed.

"(f) If, upon the consideration of a motion for a rehearing, this Court should be of the opinion that its judgment as rendered is correct, but that some revision of the opinion would be appropriate, this Court may, in its discretion and according to its power as heretofore exercised, revise the opinion accordingly, without granting a rehearing; in which event the court shall so advise the clerk, who shall then promptly notify counsel that alterations have been made.

"(g) After motions for rehearing have been disposed of, or in the absence of such motion, the Court or the Justices may revise opinions in accordance with the Code, Sec. 6-1606.

"(h) In so far as practicable, the provisions of this rule shall apply to cases certified to this Court by the Court of Appeals, and to applications for certiorari."

STATEMENT OF THE CASE

The petitioner for writ of certiorari, plaintiff below, as the sole heir at law of his wife, brought his petition in the Fulton County, Georgia, Superior Court, against the defendants who were devisees and legatees under the will of his wife, seeking: (1) to declare null and void and to cancel an acknowledgment of service and assent to probate of the will in solemn form instanter, which he had theretofore signed; (2) to set aside the probate of the will in

solemn form; (3) to enforce an alleged oral agreement of his wife to leave her property to him upon her death; (4) to enjoin interference with his peaceful possession of the property, further administration by the executor, and further prosecution of a dispossessory warrant brought by J. W. Simmons, one of the defendants and a devisee under the will; (5) for an accounting; (6) for the appointment of a receiver; and, (7) for damages.

The trial court sustained the defendants' general demurrer and dismissed the petition on the ground that it did not set out a cause of action against the defendants.

Within the time required by law, the plaintiff filed his writ of error for a review of said judgment in the Supreme Court of Georgia, which entered its judgment affirming the trial court on March 16, 1960. Although the remittitur from the Supreme Court of Georgia was not forwarded to the clerk of the trial court until March 29, 1960, and although the rules and practice in the Supreme Court of Georgia authorize the filing of a motion for a rehearing within ten days following a judgment of that court, no such motion for rehearing was filed by the plaintiff.

The case is before this Court on plaintiff's petition for writ of certiorari to review the decision of the Supreme Court of Georgia.

FACTS

Stripped of its prayers for ancillary relief, together with supporting allegations, plaintiff's petition sought to set out three causes of action:

(1) A cause of action to vacate and set aside the order probating the will in solemn form because of the violation of confidential relationship and fraud of the executor, J. W. Simmons, in securing the acknowledgment of service and assent to probate;

(2) A cause of action for the specific performance of an alleged agreement by plaintiff's wife to execute a will leaving all of her property to plaintiff; and

(3) A cause of action for damages against the defendants for their conduct alleged to have caused plaintiff's wife to breach her contract to execute a will leaving all of her property to him.

With reference to the alleged confidential relationship between plaintiff and defendant, J. W. Simmons, the only material allegations of fact set up in the petition were:

"35. Said Simmons had been a frequent visitor in the home of petitioner and his wife for several years.

"36. Petitioner and his wife had been frequent visitors in the home of said Simmons for several years.

"37. Said Simmons **had been** a very close personal, confidential and business advisor to petitioner for several years." (Emphasis added). (Record in S. Ct. of Ga. 4).

There were no allegations that any confidential relationship existed between plaintiff and defendant J. W. Simmons at the time plaintiff signed the waiver and assent to the probate in solemn form, or that any confidential relationship existed at any time with reference to the subject matter of the transaction, which was the probate of the will.

There was no allegation that at the time he signed the acknowledgment of service and assent to probate in solemn form plaintiff could not read what he was signing, or understand its meaning. To the contrary, he set out several allegations showing that he was mentally competent when he signed the document. In paragraph 54 of the petition, plaintiff alleged that he went to the Court House for the purpose of requesting the defendant J. W. Simmons to help him get the relatives of his wife out of his home, **thinking** that Simmons could and would do so without offending the relatives (Record in S. Ct. of Ga. 6). In Paragraph 61 plaintiff alleged that when Simmons called upon him to sign the acknowledgment of service, plaintiff objected, reminding Simmons of his agreement through petitioner's daughter the day before (Record S. Ct. of Ga. 7). Plaintiff alleged in paragraphs 68 and 69 that after Simmons insisted on plaintiff signing

the acknowledgment of service, petitioner asked Simmons to read what he wanted plaintiff to sign, and that after Simmons read from the document, plaintiff, believing that Simmons had correctly read the acknowledgment of service, that the probate of the will would be in solemn form on June, 1959, and believing that the alleged will was his wife's true last will and testament, and that all he was doing was acknowledging that he had notice of the probate proceedings, plaintiff signed the acknowledgment of service (Record, in S. Ct. of Ga. 9).

It was alleged that when plaintiff signed the acknowledgment of service and the assent to the probate in solemn form, he did this in the Office of the Clerk of Superior Court of Fulton County, Georgia, which was on the same floor with and across the hall from the Office of the Ordinary of Fulton County (Record, in S. Ct. of Ga. 4). There was no allegation that plaintiff asked anyone else who might be in the Court House to read the document to him before he signed it, or that there was any emergency requiring him to sign at that particular moment.

After the acknowledgment of service was signed the will was probated in common form on April 23, 1959 (Record, in S. Ct. of Ga. 12). It was not probated in solemn form until May 4, 1959, eleven days later (Record, in S. Ct. of Ga. 26). There was no allegation that plaintiff was unable to read the will or file his objections to its probate at any time during the eleven day period which elapsed between the time he signed the acknowledgment and assent (which was prior to April 23, 1959), and the day when the order for probate in solemn form was taken on May 4, 1959.

With reference to the alleged oral agreement of plaintiff's wife to execute a will leaving all of her property to plaintiff, the only allegations of fact set out in the petition were:

"14. Several years prior to her death petitioner's said wife said she had made her Last Will and Testament,

"15. Prior to her last illness petitioner's said wife time and again said during their married life that she was leaving her entire estate at her death to petitioner.

"23. Petitioner relied upon his said wife's statements, and acted thereon." (Record, in St. Ct. of Ga. 2).

"129. After said wife assured petitioner that she was going to leave her entire estate to petitioner at her death he believed it and in reliance thereon made valuable improvements to said realty." (Record, in S. Ct. of Ga. 16).

Plaintiff nowhere alleged that his wife made these statements in consideration of any promises or performance of plaintiff, or that plaintiff's wife ever contemplated any agreement in this respect or that there was in fact any meeting of the minds or agreement at all.

No treaty or statute of the United States or statute of any state was ever alleged or interposed at any stage of the proceeding in the trial court or in the Supreme Court of Georgia. No title, right, privilege or immunity claimed under the Constitution, treaty or statutes of, or commission held, or authority exercised under, the United States, was ever alleged or claimed at any stage of the proceedings in the trial court or in the Supreme Court of Georgia.

ARGUMENT

THE SUPREME COURT OF THE UNITED STATES HAS NO JURISDICTION TO REVIEW THE DECISION OF THE SUPREME COURT OF GEORGIA IN THE INSTANT CASE BECAUSE NO FEDERAL QUESTION OF ANY NATURE WAS RAISED IN, CONSIDERED BY, OR DECIDED BY THE SUPREME COURT OF GEORGIA OR THE TRIAL COURT.

Although in a paragraph entitled "Jurisdiction" appearing on page eight (8) of his petition, petitioner invokes the jurisdiction of this court under several sections of Title 28 of the U. S. Code, which sections are either non-existent or irrelevant, it seems clear from the language following these citations that petitioner is relying on Section 1257 (3) of Title 28 of the Code, to establish jurisdiction for this review.

Whatever petitioner's contentions in this regard may be, his petition must fail because no Federal question was raised in, considered by, or decided by the Supreme Court of Georgia, or by the trial court. No treaty or statute of the United States was set up in the pleadings, or raised in any stage of the proceedings below. No state statute was drawn into issue on any Federal ground. No title, right, privilege or immunity under the Constitution, treaties, statutes, or other authority of the United States was ever set up or claimed in any way in the trial court, or in the Supreme Court of Georgia.

All issues set up in and decided by the trial court and by the Supreme Court of Georgia involved pure questions of state law. These issues, three in number, were:

1. Did the alleged conduct of the defendant executor, J. W. Simmons, in connection with the probate of the subject will, justify the vacating and setting aside of the order of probate on the ground of fraud under the laws of Georgia?

2. Did the allegations of the petition set up an agreement of the testatrix to make a will in favor of the petitioner, which agreement was subject to specific performance under the laws of Georgia?

3. Did the alleged conduct of the defendants justify a claim for damages against them for interference with any contractural rights of the petitioner?

The trial court and the Supreme Court of Georgia decided each of these questions against the petitioner. In doing so, these state courts discussed only Georgia law. As a matter of fact, counsel for neither petitioner nor the defendants cited or discussed any Federal decisions or principles, and neither counsel nor the courts below ever considered at any stage of the proceedings that any Federal question was involved.

This Court has repeatedly held that it will take jurisdiction to review a decision of a State Court only when a Federal question was actually raised and decided in the State

Court. **Maxwell v. Newbold,** 18 How. 511; **Crowell v. Randall,** 10 Pet. 368, 398; **Brown v. Colorado,** 106 U. S. 639; **Hager v. California,** 154 U. S. 639; **Chouteau v. Gibson,** 111 U. S. 200; **Mutual Life Ins. Co. v. McGrew,** 188 U. S. 291; **Sayward v. Denny,** 158 U. S. 180; **Durley v. Mayo, Custodian,** 351 U. S. 277; **Michigan Sugar Co. v. Michigan,** 185 U. S. 112.

When the validity of no treaty or statute of, or authority exercised under the United States, nor of a statute of, or authority exercised under any state, is drawn into question by a state court, it is essential to the maintenance of jurisdiction in the Supreme Court of the United States that it should appear that some title, right, privilege, or immunity under the Constitution or laws of the United States, was specially set up or claimed there, and that the decision of the highest court of the State in which such decision could be had, was against the title, right, privilege, or immunity so set up or claimed. **Sayward v. Denny,** 158 U. S. 180.

That some Federal question was raised, considered, and decided must affirmatively appear on the face of the record. It is not enough that there may be somewhere hidden in the record a question, which if it had been raised, would have been of a Federal nature. **Millan, Director General v. O'Neil,** 275 U. S. 212, 214. The assertion of a Federal right or claim must be made unmistakably and not left to mere inference. **Winona, etc. Land Co. v. Minnesota,** 159 U. S. 540; **Michigan Sugar Co. v. Michigan,** 185 U. S. 112.

The Federal question must not only have been raised, but its decision must have been necessary to the determination of the case by the state court. **Honeyman v. Hanson,** 300 U. S. 14, 18; **Lynch v. New York,** 293 U. S. 52.

Measured by any or all of these standards petitioner's case fails to show that any Federal question was raised in, considered by, or decided by the Georgia Supreme Court, and it is respectfully submitted that this Court is without jurisdiction in the matter.

II. PETITIONER FAILED TO EXHAUST HIS OPPORTUNITIES FOR APPELLATE REVIEW IN THE STATE COURTS.

Although it is conceded that the decision of the Supreme Court of Georgia rendered on March 16, 1960, became final when the remittitur was forwarded by the Clerk of the Supreme Court to the Clerk of the trial court on March 29, 1960, petitioner was afforded an opportunity under Rule 40 of the Supreme Court of Georgia (Sec. 24-4544 of the Code of Georgia, 1933, as amended), and the practice there prevailing to apply to that court for a rehearing within ten (10) days following the rendition of the judgment on March 16, 1960. This petitioner did not do. This Court held in **Osment v. Pitcairn,** 317 U. S. 587, that failure to exhaust the appellate review provided by state law would require denial of the petition for writ of certiorari for want of jurisdiction. See also **Mellon Co. v. McCafferty,** 239 U. S. 134.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,

PAUL WEBB, JR.
Attorney for Petitioner.

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APPENDIX

Opinion of the Supreme Court of Georgia:

IN THE SUPREME COURT OF GEORGIA
20805. CHARLES v. SIMMONS et al.

1. The petition to cancel and declare void an acknowledgment of service of application for probate of a will in solemn form, and to set aside the probate of the will in solemn form, for fraud, failed to set out a cause of action, as the petitioner, by the exercise of reasonable diligence could have discovered the facts upon which he relies to annul the judgment.

2. Allegations that the petitioner's wife, for several years prior to her death, had on numerous occasions told the petitioner that she was going to leave her property to him at her death, and that, relying thereon, the petitioner made valuable improvements on the property, fail to set out a cause of action for specific performance of an oral contract to convey real and other property, as no agreement on the part of the wife to leave her property to him in consideration of what he might do is alleged.

3. In the absence of a valid enforceable contract, a cause of action will not lie against one charged with causing another to breach his contract to the damage of the latter.

ARGUED FEBRUARY 8, 1960—
DECIDED MARCH 16, 1960.

Equitable petition. Fulton Superior Court. Before Judge Pharr. December 1, 1959.

The plaintiff, as the sole heir at law of his wife, brought his petition in Fulton Superior Court against the defendants, the devisees and legatees under the will of his wife, seeking to declare null and void and to cancel an acknowledgment of service and assent to probate of the will in solemn form

instanter; to set aside the probate of the will in solemn form; to enforce an alleged oral agreement of his wife to leave her property to him upon her death; to enjoin interference with his peaceful possession of the property, further administration by the executor, and further prosecution of a dispossessory warrant brought by J. W. Simmons, a defendant and a devisee under the will; for an accounting; for the appointment of a receiver; and for damages. To a judgment sustaining a general demurrer to his petition, the plaintiff excepts.

Reed, Ingram & Flournoy, Phillips & Johnson, for plaintiff in error.

Sheats, Parker & Webb, Paul Webb, Jr., contra.

MOBLEY, Justice. 1. The petition fails to set forth a cause of action to vacate and set aside the order probating the will in solemn form, because of alleged fraud of J. W. Simmons in securing the acknowledgment of service and assent to probate in solemn form instanter from the plaintiff. The petition alleges that the defendant, J. W. Simmons, who was named executor of the will, prior to the filing of the will for probate and his qualification as executor, asked the plaintiff to acknowledge service of the application for probate; that the plaintiff, who was still in a dazed, broken-up, and emotional state on account of the death of his wife, asked J. W. Simmons to read the acknowledgment to him; that the defendant Simmons read the acknowledgment of service but failed to read the words "and hereby assent to the probate of the will in solemn form instanter," which were contained in the acknowledgment; that Simmons did not tell him that he was agreeing to probate of the will in solemn form instanter, but told him that it would not be probated in solemn form until the first Monday in June 1959; that, relying on Simmons' representations, he did not read the acknowledgment of service; that, immediately after signing the acknowledgment of service, he was handed a copy of the will but did not read it for several days; that, the day after the entombment of his wife, who died on April 19, 1959, he signed the acknowledgment of service, and the

will was probated in common form on April 23 and in solemn form on May 4.

". . . While the judgment of a court may be set aside for proper cause, it will not be done if the party complaining does not show proper diligence in discovering or attempting to discover the facts upon which he relies to annul the judgment." **Hightower v. Williams,** 104 Ga. 608, 610 (30 S. E. 862). "Courts of equity grant relief only in favor of the diligent; and this court has uniformly held that equity does not relieve from a judgment which could have been prevented but for the negligence of the complaining party. **Rogers v. Kingsbury,** 22 Ga. 60; **Vaughn v. Fuller,** 23 Ga. 366. Negligence of a party precludes the interference of equity against the judgment. **Yopp v. Clopton,** 32 Ga. 362; **Hill v. Harris,** 42 Ga. 412." **Redwine v. McAfee,** 101 Ga. 701, 704 (29 S. E. 428).

"The Code declares that if a party, by reasonable diligence, could have had knowledge of the truth, equity will not relieve. § 37-211. Any misrepresentation, act, or artifice intended to deceive, and which does deceive another, is such a fraud as may authorize cancellation of a written contract; but, as this court has often held, a party to a contract who can read must read or show a legal excuse for not doing so, and ordinarily, if fraud is the excuse, it must be such fraud as prevents the party from reading." **Livingston v. Barnett,** 193 Ga. 640, 653 (19 S. E. 2d 385). See **Whitfield v. Whitfield,** 204 Ga. 64, 65 (48 S. E. 2d 852.) The foregoing principles are applicable to the execution by the plaintiff of the acknowledgment of service and assent to probate of the will in solemn form instanter. The rule, that one who can read must read, was applied by this court to an acknowledgment of service of a bill of exceptions in **Bigby v. Powell,** 25 Ga. 244 (71 Am. Dec. 168).

The plaintiff, by the exercise of the slightest degree of diligence could have prevented the results of fraud alleged to have been perpetrated upon him. First, he could and should have read what he was signing. Furthermore, the will was not probated in solemn form until May 4, about two weeks after he acknowledged service. He had ample

time to discover the fraud and prevent the consequences by the exercise of proper diligence.

The allegations do not show mental incompetence of the plaintiff either at the time he signed the acknowledgment of service or during the interval from the day he signed the acknowledgment through May 4. The allegation that Simmons was a frequent visitor in the plaintiff's home and that he had been a close personal, confidential, and business adviser to the plaintiff does not establish the existence of a confidential relationship between them within the meaning of Code § 37-707. See **Dover v. Burns,** 186 Ga. 19 (1), 25 (196 S. E. 785), and **Lewis v. Foy,** 189 Ga. 596, 600 (6 S. E. 2d 788). At the time the fraud was allegedly perpetrated upon the plaintiff, the defendant Simmons had not qualified as executor of the will; so a confidential relationship did not exist between the plaintiff and the defendant Simmons at that time by reason of any executor-devisee relationship. By the exercise of reasonable diligence, the plaintiff could have discovered the alleged fraud committed against him; so equity will not relieve him.

2. The allegation that, several years prior to her death, the petitioner's wife said that she had made her last will and testament; that, prior to her last illness, she had time and again during their married life said that she was leaving her entire estate to him at her death; and that he, in reliance upon these statements, had made valuable improvements upon the property, fails to state a cause of action for specific performance of an oral contract to convey land or other property. This wholly fails to allege any agreement on the part of the wife to leave him her property in consideration of anything he might do. A contract between the parties is not alleged. Furthermore, "A contract upon which specific performance is sought must be certain, definite, and clear, and so precise in its terms that neither party can reasonably misunderstand it. **Studer v. Seyer,** 69 Ga. 125; **Hill v. Hill,** 149 Ga. 50, 52 (99 S. E. 31); **Adcock v. Shaw,** 167 Ga. 710 (146 S. E. 478); **Blumenfeld v. Citizens Bank & Trust Co.,** 168 Ga. 322 (147 S. E. 579)." **Harris v. Trippi,** 209 Ga. 369, 372 (72 S. E. 2d 704).

3. The petition does not state a cause of action for damages on account of the alleged "wrongful acts, deeds, and conduct of the defendants." As we construe this contention, it is that the plaintiff is entitled to damages because the defendants have wrongfully interfered with his contractual rights to be named beneficiary in the will of his wife.

While it is actionable to maliciously and without justifiable cause induce one to break his contract with another to the damage of the latter (**Luke v. DuPree,** 158 Ga. 590, 595 (1), 124 S. E. 13, and cases cited), this presupposes the existence of a valid, enforceable contract; and where, as here, there was no such contract and the plaintiff had no contractual rights to be violated, a cause of action will not lie therefor. **Baker v. American Oil Co.,** 90 Ga. App. 662 (83 S. E. 2d 826).

Judgment affirmed. All the Justices concur.

CERTIFICATE OF SERVICE

I, Paul Webb, Jr., attorney for the respondent, hereby certify that, on the day of , 1960, I served copies of the within and foregoing brief on behalf of respondent on Charles W. Anderson, Melvin Pazol, and Oze R. Horton, attorneys for the petitioner, by mailing copies in a duly addressed envelope, with first class postage prepaid, to their office at 911 Georgia Savings Bank Building, Atlanta 3, Georgia.

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